

Article VIII Nonconforming Situations

Section 138. Definitions

[a] Unless otherwise specifically provided for or unless clearly required by the context, the words and phrases defined in this section shall have the meaning indicated when used in this article.

- [1] *Dimensional Nonconformity:* A nonconforming situation that occurs when the height, size or minimum floor space of a structure or the relationship between an existing building or buildings and other buildings or lot lines does not conform to the regulations applicable to the district in which the property is located.
- [2] *Effective Date of This Ordinance:* Whenever this article refers to the effective date of this ordinance, the reference shall be deemed to include the effective date of any amendments to this ordinance if the amendment, rather than this ordinance as originally adopted, creates a nonconforming situation.
- [3] *Expenditure:* A sum of money paid out in return for some benefit or to fulfill some obligation. The term also includes binding contractual commitments to make future expenditures, as well as any other substantial changes in position.
- [4] *Nonconforming Lot:* A lot existing at the effective date of this ordinance (and not created for the purposes of evading the restrictions of this ordinance) that does not meet the minimum area requirement of the district in which the lot is located.
- [5] *Nonconforming Project:* Any structure, development, or undertaking that is incomplete at the effective date of this ordinance and would be inconsistent with any regulation applicable to the district in which it is located if completed as proposed or planned.
- [6] *Nonconforming Sign:* A sign that, on the effective date of this ordinance does not conform to one or more of the regulations set forth in this ordinance, particularly Article XVIII, Signs.

- [7] *Nonconforming Use*: A nonconforming situation that occurs when property is used for a purpose or in a manner made unlawful by the use regulations applicable to the district in which the property is located. (For example, a commercial office building in a residential district may be a nonconforming use). The term also refers to the activity that constitutes the use made of the property. (For example, all the activity associated with running a bakery in a residentially zoned area is a nonconforming use).
- [8] *Nonconforming Situation*: A situation that occurs when, on the effective date of this ordinance, an existing lot or structure or use of an existing lot or structure does not conform to one or more of the regulations applicable to the district in which the lot or structure is located. Among other possibilities, a nonconforming situation may arise because a lot does not meet minimum acreage requirements, because structures exceed maximum height limitations, because the relationship between existing buildings and the land (in such matters as density and setback requirements) is not in conformity with this ordinance, or because land or buildings are used for purposes made unlawful by this ordinance. Nonconforming signs shall not be regarded as nonconforming situations for purposes of this article but shall be governed by the provisions of Section 341.

Section 139. Continuation of Nonconforming Situations and Completion of Nonconforming Projects

[a] Unless otherwise specifically provided in this ordinance and subject to the restrictions and qualifications set forth in Sections 143 through 145, nonconforming situations that were otherwise lawful on the effective date of this ordinance may be continued.

[b] Nonconforming projects may be completed only in accordance with the provisions of Section 145.

Section 140. Nonconforming Lots

[a] When a nonconforming lot can be used in conformity with all of the regulations applicable to the intended use, except that the lot is smaller than the required minimum set forth in Section 200, then the lot may be used as proposed just as if it were conforming. However, no use that requires a greater lot size than the established minimum lot size for a particular zone is permissible on a nonconforming lot.

[b] When the use proposed for a nonconforming lot is one that is conforming in all other respects but the applicable setback requirements (Section 200) cannot be complied with, then the entity authorized by this ordinance to issue a permit for the proposed use (the administrator, Board of Adjustment or council) may allow deviations from applicable setback regulations if it finds that:

- [1] The property cannot reasonably be developed for the use proposed without such deviations,
- [2] These deviations are necessitated by the size or shape of the nonconforming lot, and
- [3] The property can be developed as proposed without any significantly adverse impact on surrounding properties or the public health or safety.

[c] For purposes of Subsection [b], compliance with applicable building setback requirements is not reasonably possible if a building that serves the minimal needs of the use proposed for the nonconforming lot cannot practicably be constructed and located on the lot in conformity with such setback requirements. However, mere financial hardship does not constitute grounds for finding that compliance is not reasonably possible.

[d] This section applies only to undeveloped nonconforming lots. A lot is undeveloped if it has no substantial structures upon it. A change in use of a developed nonconforming lot may be accomplished in accordance with Section 143.

[e] Subject to the following sentence, if, on the date this section becomes effective, an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, then neither the owner of the nonconforming lot nor his successors in interest may take advantage of the provisions of this section. This subsection shall not apply to a nonconforming lot if a majority of the developed lots located on either side of the street where such lot is located and within five hundred (500) feet of such lot are also nonconforming. The intent of this subsection is to require nonconforming lots to be combined with other undeveloped lots to create conforming lots under the circumstances specified herein, but not to require such combination when that would be out of character with the way the neighborhood has previously been developed

[f] Where a nonconforming lot was created by public taking action or the result of a court order, the combination or recombination of lots as described in Subsection [e] shall not be required.

Section 141. Extension or Enlargement of Nonconforming Situations

[a] Except as specifically provided in this section, no person may engage in any activity that causes an increase in the extent of nonconformity of a nonconforming situation. In particular, physical alteration of structures or the placement of new structures on open land is unlawful if such activity results in:

- [1] An increase in the total amount of space devoted to a nonconforming use, or
- [2] Greater nonconformity with respect to dimensional restrictions such as setback requirements, height limitations or density requirements or other requirements such as parking requirements.

[b] Subject to Subsection [d], a nonconforming use may be extended throughout any portion of a completed building that, when the use was made nonconforming by this ordinance, was manifestly designed or arranged to accommodate such use. However, Subject to Section 145 (authorizing the completion of nonconforming projects in certain circumstances), a nonconforming use may not be extended to additional buildings or to land outside the original building.

[c] Subject to Section 145 (authorizing the completion of nonconforming projects in certain circumstances), a nonconforming use of open land may not be extended to cover more land than was occupied by that use when it became nonconforming, except that a use that involves the removal of natural materials from the lot (e.g., a sand pit) may be expanded to the boundaries of the lot where the use was established at the time it became nonconforming if ten percent (10%) or more of the earth products had already been removed on the effective date of this ordinance.

[d] The volume, intensity or frequency of use of property where a nonconforming situation exists may be increased and the equipment or processes used at a location where a nonconforming situation exists may be changed if these or similar changes amount only to changes in the degree of activity rather than changes in kind and no violations of other paragraphs of this section occur.

[e] Any structure used for single family residential purposes may be enlarged or replaced with a similar structure of a larger size, so long as the enlargement or replacement does not create new nonconformities or increase the extent of existing nonconformities with respect to such matters as setback and parking requirements, nor does it not compromise the health, safety and welfare of the residents. This paragraph is subject to the limitations stated in Section 144 (abandonment and discontinuance of nonconforming situations).

[f] Whenever: (i) there exists a lot with one or more structures on it, and (ii) a change in use that does not involve any enlargement of a structure is proposed for such lot, and (iii) the parking or loading requirements of Article XIX that would be applicable as a result of the proposed change cannot be satisfied on such lot because there is not sufficient area available on the lot that can practically be used for parking or loading, then the proposed use shall not be regarded as resulting in an impermissible extension or enlargement of a nonconforming situation. However, the applicant shall be required to comply with all applicable parking and loading requirements that can be satisfied without acquiring additional land, and shall also be required to obtain satellite parking in accordance with Section 352 if: (i) parking requirements cannot be satisfied on the lot with respect to which the permit is required; and, (ii) such satellite parking is reasonably available. If such satellite parking is not reasonably available at the time the zoning or special use permit is granted, then the permit recipient shall be required to obtain it if and when it does become reasonably available. This requirement shall be a continuing condition of the permit.

Section 142. Repair, Maintenance and Reconstruction

[a] Minor repairs to and routine maintenance of property where nonconforming situations exist are permitted, encouraged, and do not require a zoning permit. Major repairs, maintenance, or renovation, i.e., work estimated to cost more than fifty percent (50%) of the appraised valuation of the structure to be renovated may be done only in accordance with a zoning permit issued pursuant to this section.

[b] If a structure located on a lot where a nonconforming situation exists is damaged to an extent that the costs of repair or replacement would exceed fifty percent (50%) of the appraised valuation of the damaged structure, then the damaged structure may be repaired or replaced only in accordance with a zoning permit issued pursuant to this section. This subsection does not apply to structures used for single family residential purposes, which structures may be reconstructed pursuant to a zoning permit just as they may be enlarged or replaced as provided in Subsection 141 [e].

[c] For the purposes of Subsections [a] and [b]:

- [1] The “cost” of renovation or repair or replacement shall mean the fair market value of the materials and services necessary to accomplish such renovation , repair or replacement.
- [2] The “cost” of renovation, repair or replacement shall mean the total cost of all such intended work, and no person may seek to avoid the intent of Subsections [a] or [b] by doing such work incrementally.

- [3] The “appraised valuation” shall mean either the appraised valuation for property tax purposes, updated as necessary by the increase in the consumer price index since the date of the last valuation, or the valuation of a professionally recognized property appraiser.

[d] The administrator shall issue a permit authorized by this section if he finds that, in completing the renovation, repair or replacement work:

- [1] No violation of Section 141 will occur, and
- [2] The permittee will comply to the extent reasonably possible with all provisions of this ordinance applicable to the existing use (except that the permittee shall not lose his right to continue a nonconforming use).

Compliance with a requirement of this ordinance is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible.

Section 143. Change in Use of Property Where a Nonconforming Situation Exists

[a] A change in use of property (where a nonconforming situation exists) that is sufficiently substantial to require a new zoning or special use permit in accordance with Section 61 may not be made except in accordance with Subsections [b] or [c]. However, this requirement shall not apply if only a sign permit is needed.

[b] If the intended change in use is to a principal use that is permissible in the district where the property is located, and all of the other requirements of this ordinance applicable to that use can be complied with, permission to make the change must be obtained in the same manner as permission to make the initial use of a vacant lot. Once conformity with this ordinance is achieved, the property may not revert to its nonconforming status.

[c] If the intended change in use is to a principal use that is permissible in the district where the property is located, but all of the requirements of this ordinance applicable to that use cannot be reasonably complied with, the change is permissible if the entity authorized by this ordinance to issue a permit for that particular use (the administrator, Board of Adjustment, or council) issues a permit authorizing the change. This permit may be issued if the permit issuing authority finds, in addition to any other findings that may be required by this ordinance, that:

- [1] The intended change will not result in a violation of Section 141, and
- [2] All of the applicable requirements of this ordinance that can reasonably be complied with will be complied with. Compliance with a requirement of this ordinance is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible. And in no case may an applicant be given permission pursuant to this subsection to construct a building or to add to an existing building if additional nonconformities would thereby be created.

Section 144. Abandonment and Discontinuance of Nonconforming Situations

[a] When a nonconforming use is discontinued for a period of one hundred eighty (180) days, in any twelve month period, the property involved may thereafter be used only for conforming purposes.

[b] Except as provided in Subsection [a], all work on any nonconforming project shall cease on the effective date of this ordinance, and all permits previously issued for work on nonconforming projects may begin or may be continued only pursuant to a zoning, special use or sign permit issued in accordance with this section by the individual or board authorized by this ordinance to issue permits for the type of development proposed. The permit issuing authority shall issue such a permit if it finds that the applicant has in good faith made substantial expenditures or incurred substantial binding obligations or otherwise changed his position in some substantial way in reasonable reliance on the land use law as it existed before the effective date of this ordinance and thereby would be unreasonably prejudiced if not allowed to complete his project as proposed. In considering whether these findings may be made, the permit issuing authority shall be guided by the following, as well as other relevant considerations:

- [1] All expenditures made to obtain or pursuant to a validly issued and non revoked building, zoning, sign or special use permit shall be considered as evidence of reasonable reliance on the land use law that existed before this ordinance became effective.

[c] For purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities, and operations maintained on a lot are generally to be considered as a whole. For example, the failure to rent one apartment in a nonconforming apartment building for one hundred eighty (180) days shall not result in a loss of the right to rent that apartment or space thereafter so long as the apartment building as a whole is continuously maintained. But if a nonconforming use is maintained in conjunction with a conforming use, discontinuance of a nonconforming use for the required period shall terminate the right to maintain it thereafter.

[d] When a structure or operation made nonconforming by this ordinance is vacant or discontinued at the effective date of this ordinance, the one hundred eighty (180) day period for purposes of this section begins to run on the effective date of this ordinance.

Section 145. Completion of Nonconforming Projects

[a] All nonconforming projects on which construction was begun at least one hundred eighty (180) days before the effective date of this ordinance as well as all nonconforming projects that are at least ten (10) percent completed in terms of the total expected cost of the project on the effective date of this ordinance may be completed in accordance with the terms of their permits, so long as these permits were validly issued and remain non revoked and unexpired. If a development is designed to be completed in stages, this subsection shall apply only to the particular phase under construction.

[b] Except as provided in Subsection [a], all work on any nonconforming project shall cease on the effective date of this ordinance, and all permits previously issued for work on nonconforming projects may begin or may be continued only pursuant to a zoning, special use, conditional use, or sign permit issued in accordance with this section by the individual or board authorized by this ordinance to issue permits for the type of development proposed. The permit issuing authority shall issue such a permit if it finds that the applicant has in good faith made substantial expenditures or incurred substantial binding obligations or otherwise changed his position in some substantial way in reasonable reliance on the land use law as it existed before the effective date of this ordinance and thereby would be unreasonably prejudiced if not allowed to complete his project as proposed. In considering whether these findings may be made, the permit issuing authority shall be guided by the following, as well as other relevant considerations:

- [1] All expenditures made to obtain or pursuant to a validly issued and non revoked building, zoning, sign, special use or conditional use permit shall be considered as evidence of reasonable reliance on the land use law that existed before this ordinance became effective.

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- [2] Except as provided in Subdivision [b][1], no expenditures made more than one hundred eighty (180) days before the effective date of this ordinance may be considered as evidence of reasonable reliance on the land use law that existed before this ordinance became effective. An expenditure is made at the time a party incurs a binding obligation to make that expenditure.
 - [3] To the extent that expenditures are recoverable with a reasonable effort, a party shall not be considered prejudiced by having made those expenditures. For example, a party shall not be considered prejudiced by having made some expenditure to acquire a potential development site if the property obtained is approximately as valuable under the new classification as it was under the old, for the expenditure can be recovered by a resale of the property.
 - [4] To the extent that a nonconforming project can be made conforming and that expenditures made or obligations incurred can be effectively utilized in the completion of a conforming project, a party shall not be considered prejudiced by having made such expenditures.
 - [5] An expenditure shall be considered substantial if it is significant both in dollar amount and in terms of (i) the total estimated cost of the proposed project, and (ii) the ordinary business practices of the developer.
 - [6] A person shall be considered to have acted in good faith if actual knowledge of a proposed change in the land use law affecting the proposed development site could not be attributed to him.
 - [7] Even though a person had actual knowledge of a proposed change in the land use law affecting a development site, the permit issuing authority may still find that he acted in good faith if he did not proceed with his plans in a deliberate attempt to circumvent the effects of the proposed ordinance. The permit issuing authority may find that the developer did not proceed in an attempt to undermine the proposed ordinance if it determines that (i) at the time the expenditures were made, either there was considerable doubt about whether any ordinance would ultimately be passed, or it was not clear that the proposed ordinance would prohibit the intended development, and (ii) the developer had legitimate business reasons for making expenditures.

[c] When it appears from the developer's plans or otherwise that a project was intended to be or reasonably could be completed in phases, stages, segments, or other discrete units, the developer shall be allowed to complete only those phases or segments with respect to which the developer can make the showing required under Subsection [b]. In addition to the matters and subject to the guidelines set forth in Subdivisions [1] through [6] of Subsection [b], the permit issuing authority shall, in determining whether a developer would be unreasonably prejudiced if not allowed to complete phases or segments of a nonconforming project, consider the following in addition to other relevant factors:

- [1] Whether any plans prepared or approved regarding uncompleted phases constitute conceptual plans only or construction drawings based upon detailed surveying , architectural, or engineering work.
- [2] Whether any improvements, such as streets or utilities, have been installed in phases not yet completed.
- [3] Whether utilities and other facilities installed in completed phases have been constructed in such a manner or location or such a scale, in anticipation of connection to or interrelationship with approved but uncompleted phases, that the investment in such utilities or other facilities cannot be recouped if such approved but uncompleted phases are constructed in conformity with existing regulations.

[d] The permit issuing authority shall not consider any application for the permit authorized by Subsection [b] that is submitted more than sixty (60) days after the effective date of this ordinance. The permit issuing authority may waive this requirement for good cause shown, but in no case may it extend the application deadline beyond one year.

[e] The administrator shall send copies of this section to the persons listed as owners for tax purposes (and developers, if different from the owners) of all properties in regard to which permits have been issued for nonconforming projects or in regard to which a nonconforming project is otherwise known to be in some stage of development. This notice shall be sent by certified mail not less than fifteen (15) days before the effective date of this ordinance.

[f] The permit issuing authority shall establish expedited procedures for hearing applications for permits under this section. These applications shall be heard, whenever possible, before the effective date of this ordinance, so that construction work is not needlessly interrupted.

Section 146. Signs Made Non-Conforming

Any sign that was conforming at the time it was erected, and that was made non-conforming as a result of annexation or extraterritorial jurisdiction or as a result of an amendment to the Ordinance, shall be eliminated or made to conform to this Ordinance within seven (7) years after the effective date of such annexation or extraterritorial jurisdiction or after the date such amendment was enacted.

Section 147. Reserved

Section 148. Reserved

Section 149. Reserved

Section 150. Reserved

